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LESSONS OF RECENT CASES

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Hot Issues in Employment Law in 2012

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TEAM MOVES: LESSONS OF RECENT CASES

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WHAT IS A TEAM MOVE?

1. A 'team move' is the expression used to describe the situation in which a number of employees of one employer move to work for a new employer, in contrast to the departure of a single employee or the departure of more than one employee for separate reasons.

2. The term can cover a wide variety of situations from the departure of two employees to the loss of a substantial part of the workforce, in which the word "team" risks understatement. For example in UBS v Vestra [2008] EWHC 1974 (QB), [2008] IRLR 965 a total of 75 employees left UBS to join Vestra, and in Thomas v Farr plc [2007] IRLR 419 (CA)[2] 17 employees defected to Acumus, in addition to Mr Thomas himself (the former Managing Director), out of a workforce of between 40-50 staff. The common thread in these situations is not so much the team, but the fact that the move of the group of employees to the new employer is actually or allegedly co-ordinated as a whole.

3. From a legal and practical perspective, a team move also throws up a number of interesting issues that tend to be more complicated than in the case of the departure of a single employee. These present problems for those advising about team moves as much as for those responding to them.

4. Imagine a small team with members at different levels of seniority. Perhaps they are in the financial services industry, selling a financial product to an established customer base. The core members of the team may have worked

[1] Blackstone Chambers. Editor of *Employee Competition: Covenants, Confidentiality, and Garden Leave* published by OUP (2nd ed, March 2011).
[2] See also first instance decision, Farr plc v Thomas [2006] EWHC 2510 (QB).

together for several years. The most senior person in the team is likely to have a significant personal influence over the more junior members of the team.

5. There may or may not be warning signs visible to the old employer. Frequently, these are ignored until it is too late. One person will leave first, often by resigning, rather than by alleging constructive dismissal. It is often, but not necessarily the case, that this will be the most senior person in the team. Shortly afterwards, other team members start to announce their intention to leave. But are their departures part of a concerted plan, or are the individuals simply acting on their own initiative, based on friendship or their own financial self interest in following a colleague to a new employer?

6. In almost all cases, there will be a threatened or actual application for interim relief by the old employer. It will often be the case that these are dealt with by giving suitable undertakings, although since the stakes tend to be higher in team move cases than in the case of individual departures, there is probably a greater tendency to have a contested hearing of some kind even at the interim stage.

7. If the matter cannot be resolved by mediation or negotiation, the parties face the prospect of a relatively long and expensive trial. There are likely to be multiple parties and many witnesses. The issues of quantum may be particularly contentious. The costs risk in this type of case is significantly larger than in normal garden leave or post-termination restriction cases.

RECENT TEAM MOVE CASES

8. There have been many team move cases in recent years. Others are currently in the pipeline on their way to trial. There are six recent team move cases of particular interest:

   (1) Kynixa Ltd v Hynes [2008] EWHC 1495 (QB) (Wyn Williams J, 30.6.08).

   (2) UBS Wealth Management UK Ltd v Vestra LLP [2008] EWHC 1974 (QB), [2008] IRLR 965 (Openshaw J, 4.8.08).

(3) Tullett Prebon Plc v BGC Brokers LP [2010] EWHC 484 (QB), [2010] IRLR 648 (Jack J, 18.3.10); [2011] EWCA Civ 131, [2011] IRLR 420 (CA, 22.2.11).

(4) Lonmar Global Risks Ltd v West [2010] EWHC 2878 (QB), [2011] IRLR 138 (Hickinbottom J, 11.11.10).

(5) QBE Management Services (UK) Ltd v Dymoke [2012] EWHC 80 (QB), [2012] IRLR 458 (Haddon-Cave J, 27.1.12).

(6) CEF Holdings Ltd v Mundey [2012] EWHC 1524 (QB) (Silber J, 1.6.12).

9. The current score is 4-2 in the current employer's favour. Kynixa, UBS, Tullett, and QBE all uphold claims by the current employer. Lonmar and CEF held out against this tide.

10. This paper addresses three issues which arose in these six cases, and which arise in most team move cases, namely:

(1) the duty of good faith and fidelity owed by employees;

(2) the tort of conspiracy; and

(3) springboard relief.

THE DUTY OF GOOD FAITH AND FIDELITY

The nature of the duty

11. The following principles are clear[3]:

(1) It is indisputable that an employee owes his employer a contractual duty of 'fidelity', but how far it extends will depend on the facts of each case.

(2) The more senior the staff, the greater the degree of loyalty, fidelity and diligence required.

[3] QBE at [169].

(3) The first task of the court is to identify the nature of the employee's obligations of fidelity and then to decide whether the employee's activities are in breach.

(4) The mere fact that activities are described by an employee as 'preparatory' to competition does not mean that they are legitimate.

(5) It is a breach of the duty of fidelity for an employee to recruit or solicit another employee to act in competition.

(6) Attempts by senior employees to solicit more junior staff constitutes particularly serious misconduct.

(7) It is a breach of the duty of fidelity for an employee to misuse confidential information belonging to his employer.

(8) The court should ask whether the activities in which the employee is engaged affect his ability to serve his employer faithfully and honestly and to the best of his abilities.

The duty and team moves

12. In the context of 'team moves' or 'team poaching', recent cases provide useful guidance and illustrations of what may constitute illegitimate conduct[4].

13. In UBS, Openshaw J said at [24]:

"*I cannot accept that employees, in particular senior managers, can keep silent when they know of planned poaching raids upon the company's existing staff or client base and when these are encouraged and facilitated from within the company itself, the more so when they are themselves party to these plots and plans. It seems to me that that would be an obvious breach of their duties of loyalty and fidelity to [their employer].*"

14. In Kynixa, Wyn Williams J said at [283]:

[4] QBE at [170]-[175].

"*I simply do not see how one can be acting as a loyal employee when one knows that three senior employees (including oneself) may transfer their allegiance to a group of companies which includes a competitor and yet not only fail to divulge that knowledge but also say things which would have the effect of positively misleading the employer about that possibility*."

15. In Tullett Prebon, Jack J said at [68]-[69]:

"*[A] desk head must not do anything to assist the recruitment of his desk...Where a desk head decides that he is in favour of the recruitment of his desk and thereafter assists the recruitment in such small or large ways as may arise, he is in plain breach of his duty: he has crossed the line between observing his duty to his employer and acting in the interests of his employer's rival*."

16. In QBE, Haddon-Cave at [175] stated that the position as regards mutual soliciting by employees is usefully summarised as follows in Goulding on Employee Competition (2nd ed) at paras 2.164-2.166:

"*Discussions between employees as to proposed concerted competitive activity will rarely if ever be acceptable, given the near-inevitable damage to the employer as a result of such concerted activity. It remains possible that a discussion between close friends at a similar level within the business as to the potential of working together in the future would give rise to no breach. In such circumstances, neither employee would be soliciting the other and neither would be encouraging the other to terminate their employment with the employer. However, as set out in the* British Midland Tool *case, once an irrevocable intention to compete is formed, resignation and disclosure of the intention is probably the only certain means of avoiding breach.*"

17. In contrast to the above sentiments, in Lonmar, Hickinbottom J said at [151]:

"*Generally...an employee is under no obligation to report to his employer his own misconduct (Bell v Lever Brothers* [1932] AC 161), *or the misconduct of his fellow employees (Sybron v Rochem* [1983] IRLR 253); *nor is he under a restraint from legitimate preparation for himself engaging in future competition with his employer (Tunnard), or informing another employee of his plans to do so and offering him a potential job in that competitor in the future (Tither Barn v Hubbard* EAT/532/89 (Wood J), unreported, 7 November 1991). *If it is not unlawful for an employee to*

inform a fellow employee of plans to set up in competition, and (without inciting him to breach his contract with his current employer) offer him a job in the future, then the employee to whom such matters are confided cannot sensibly be under a general obligation to inform his employer of those plans and offer."

18. In QBE, Haddon-Cave J at [181] doubted whether the above dicta of Hickinbottom J accords with the main direction of travel of recent cases in this developing area of the law.

19. As to whether an employee has a duty to disclose to his employer a threat of new or increased competitive activity, Haddon-Cave J adopted as correct the following summary as correct[5]:

"*In summary, given the conflicting first instance decisions and the running of the current judicial tide against directors, the working assumption must be that directors and senior employees ought to disclose: (a) any action at all, if taken by others, that will lead to competitive activity; and (b) any action of their own, as soon as the irrevocable intention to compete is formed (unless they resign immediately).*"

The recent cases

20. Breaches of the duty of good faith and loyalty were found in Kynixa, Tullett, and QBE; there was also sufficient evidence of such breaches in UBS for interim purposes. But the cases based on such breaches in Lonmar and CEF were dismissed.

CONSPIRACY

The ingredients of unlawful means conspiracy

21. Because a team move involves more than one person, the tort of conspiracy is often alleged against the team members or those recruiting the team. Of the different types of conspiracy, it is unlawful means conspiracy which is most relevant here.

22. An oft-quoted definition of unlawful means conspiracy is the following[6]:

[5] From Goulding on Employee Competition (2nd ed), para 2.138.

"*A conspiracy to injure by unlawful means is actionable where the claimant proves that he has suffered loss or damage as the result of unlawful action taken pursuant to a combination or agreement between the defendant and another person or persons to injure him by unlawful means, whether or not it is the predominant purpose of the defendant to do so.*"

23. This tort has five elements:

(1) Common design. It is necessary to show that the defendants combined together with a common objective. It is unnecessary to show an express agreement. Defendants can join the combination at different times. However, knowledge alone of another's actions is insufficient.

(2) Concerted action. It is necessary that concerted action is taken by one or more of the conspirators to further the common design. It is unnecessary that all conspirators take action.

(3) Unlawful means. It is necessary that the common design is to use unlawful means, that they are used and that they cause the loss complained of. In addition, to be liable the defendants must know that the means are unlawful. Such knowledge can be actual, or what is often referred to as "blind-eye" or Nelsonian knowledge. This requires the defendant to have a firmly grounded suspicion that unlawful means are used but to refrain from enquiry in order to avoid obtaining certain knowledge of the truth (see Bank of Tokyo-Mitsubishi v Baskan [2009] EWHC 1276 (Ch) at [834]-[848]).

(4) Intention to injure. It is necessary that the conspirators intend to injure the victim. However, intention is made out if the injury is the means to the conspirators' commercial ends. Loss to the claimant is the other side of the coin from gain to the defendants. The defendant's gain and the claimant's losses are, to the defendants' knowledge, inseparably linked.

(5) Damage. Damage is an essential ingredient of the tort.

[6] Kuwait Oil Tanker Co SAK v Al Bader [2000] 2 All ER (Comm) 271, per Nourse LJ at [108].

24. Conspiracy is a serious allegation, and a high standard of proof is required. This was emphasised by Silber J in CEF at [74] in agreeing that it is well settled that[7]:

> "*...a charge of conspiracy in civil proceedings is generally to be regarded as a grave charge; and that, particularly where the allegation is made against persons of hitherto unblemished reputation, the standard of proof which has to be satisfied before a court can properly hold that the charge is established is a high one, commensurate with the seriousness of the charge.*"

25. The courts have said that a conspiracy claim requires a painstaking investigation of the extent to which each defendant (i) shared a common objective with the primary wrongdoers, and (ii) knew that the objective was to be achieved by unlawful means.

The recent cases

26. In Tullett and QBE, the allegations of conspiracy were upheld whereas in Lonmar and CEF they were dismissed. Conspiracy did not feature in the Kynixa judgment, whereas in UBS there was a serious issue to be tried that there was "*an unlawful conspiracy dressed up as lawful competition*"[8].

SPRINGBOARD RELIEF

Basic springboard principles

27. The principles behind 'springboard' relief are now well-established and may be summarised as follows[9]:

    (1) Where a person has obtained a 'head start' as a result of unlawful acts, the court has power to grant an injunction which restrains the wrongdoer, so as to deprive him of the fruits of his unlawful acts. This is often known as 'springboard' relief.

[7] Citing Jarman & Platt Ltd v Barget Ltd [1977] FSR 260, per Megaw LJ at 267.
[8] [35].
[9] QBE at [239]-[247], and adopted as correct in CEF at [72] and [128].

(2) The purpose of a 'springboard' order is to prevent the defendants from taking unfair advantage of the springboard which they have built up by their wrongdoing.

(3) 'Springboard' relief is not confined to cases of breach of confidence. It can be granted in relation to breaches of contractual and fiduciary duties, and flows from a wider principle that the court may grant an injunction to deprive a wrongdoer of the unlawful advantage derived from his wrongdoing.

(4) 'Springboard' relief must be sought and obtained at a time when any unlawful advantage is still being enjoyed by the wrongdoer.

(5) 'Springboard' relief should have the aim simply of restoring the parties to the competitive position they each set out to occupy and would have occupied but for the defendants' misconduct. It is not fair and just if it has a much more far-reaching effect than this, such as driving the defendant out of business.

(6) 'Springboard' relief will not be granted where a monetary award would have provided an adequate remedy to the claimant for the wrong done to it.

(7) 'Springboard' relief is not intended to punish the defendant for wrongdoing. It is merely to provide fair and just protection for unlawful harm on an interim basis. What is fair and just in any particular circumstances will be measured by (i) the effect of the unlawful acts on the claimant; and (ii) the extent to which the defendant has gained an illegitimate competitive advantage. The seriousness or egregiousness of the particular breach has no bearing on the period for which the injunction should be granted.

(8) The burden is on the claimant to spell out the precise nature and period of the competitive advantage. An 'ephemeral' and 'short-term' advantage will not be sufficient.

The length of a springboard injunction

28. As to the length of the springboard injunction, the essential question is how much of a march have the defendants stolen on the claimant as a result of their wrongdoing.

29. The principles to be applied by the court in this assessment exercise are as follows[10]:

(1) The appropriate measure for the length of a springboard injunction is the length of time that it would have taken the wrongdoer to achieve lawfully what he in fact achieved unlawfully, relative to the victim.

(2) The exercise is a relative one and any advantage must be measured as such. Wrongful activities may have both a positive and negative effect, ie benefitting the wrongdoer whilst simultaneously harming the victim. Thus, for instance, the unlawful poaching of key staff is likely to advantage the wrongdoing party whilst disadvantaging the victim who has lost key staff and may have to recover lost market ground.

(3) It is relevant to look at the period of time over which the unlawful activities have in fact taken place.

(4) There may be many factors at play during the period of unlawful activity materially affecting the advantage gained which may, or may not, obtain in similar assumed circumstances of purely lawful activity. These factors might include, for instance (i) the advantage of soliciting junior employees whilst still being employed and in positions of power, compared with the trying to recruit as an ex-employee, (ii) the advantage of stealth and secrecy, so that management are unaware and do not take defensive measures, and (iii) conversely, the advantage sometimes of being able to work speedily and not having to be covert.

(5) The nature and length of the springboard relief should be fair and just in all the circumstances.

[10] QBE at [285].

The recent cases

30. In UBS, springboard relief was granted until speedy trial; in Tullett, protection was granted by injunction for 12 months (essentially on the basis of garden leave – a claim for an 18-month springboard injunction was dismissed); and in QBE, springboard relief was granted for a period of 12 months after the resignations of the employees (which was also two months after the date for insurance renewals)[11]. In CEF, springboard relief was refused (even if the judge erred in finding there was no conspiracy), it did not arise in Lonmar (given the findings on liability), and it was not addressed in the judgment in Kynixa.

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[11] QBE, at [293].